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Office - Supreme Court,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 399

IN RE: JOSEPH F. VITARI,

Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 399

IN RE: JOSEPH F. VITARI,

Petitioner

To the Honorable the Supreme Court of the United States:

The petition of Joseph F. Vitari, of full age of majority and a resident of the Parish of Orleans, State of Louisiana, with respect represents:

That petitioner is entitled to the issuance of writs of certiorari and review on the following grounds, and for the following reasons, to-wit:

I

That on June 26, 1952, and July 3, 1952, in answer to a subpoena, petitioner appeared before the Grand Jury then in session for the Parish of Orleans, New Orleans, Louisiana, and was asked, among other questions, the following:

> Q. Foreman: Have you earned anything in addition to your salary on the Police Force?
>
> Q. Foreman: I will repeat the question, Captain. From January 1, 1948 to December 31, 1951, did you or did you not receive income in addition to your salary as an officer of the New Orleans Police Department?
>
> Q. Foreman: I have before me, Captain Vitari, a series of other questions which I want to ask you. You

have a large number of loans around the City in both amount and number, or you have during the past three or four years. Will you tell me from what institutions you have been borrowing?

Q. Foreman: You testified to me under oath previously that on the home that you owned across the lake, Waveland, I believe it was, that you had a loan on it which you were paying and I wondered if you can tell us to the best of your recollection how much per year you paid on that loan during the past four years?

Q. Foreman: For the year 1952, we have incomplete figures since the year has not run out yet. So, I will not go into that. Captain, you can see what we are getting at here. You show a salary in 1950 and 1951, which is considerably less than the amount of money which you actually paid to various lending institutions, exclusive of refinancing. This does not take into account your personal living expenses, or any other expenses which you may have had. And we would like to ask you an explanation on this fact.

Q. Mr. Screen: Do you have any interest in any other businesses, Captain?

Q. Mr. Screen: Captain, as this is a bribery investigation you know that in the question of investigating bribery that anyone who gives evidence is granted immunity, constitutional immunity, once they have given that evidence, and the District Attorney is free to grant such immunity to an individual giving that evidence. You know that, I presume?

Q. Captain, with that in mind, I ask you again how can you account for the funds that you have expended for your loans, both from the Credit Union, the banks and from private lending agencies, and for your living expenses?

Q. Mr. Screen: What do you estimate your net worth was at the time you became a Captain?

Q. Foreman: Can you tell us what income you have reported for the past four years?

Q. Mr. Screen: Have you been given any money by

anyone as a gift? I do not mean necessarily as a bribe, but as a gift?

Q. Mr. Screen: Did you have accumulated before January, 1948 any funds in excess of the amount you testified to at the previous time, which I think was a couple of hundred dollars?

Q. Mr. Screen: Captain, to the best of your recollection, what are your monthly payments to the Merchants Bank in Bay St. Louis?

Q. Mr. Screen: From what funds do you make your payments on your loan at the Merchants Bank in Bay St. Louis?

Q. Mr. Screen: Well, Captain, in other words your answer seemed to be contradictory. You say you received no loans, credits or no emoluments from anyone and you tell me then that you have no other income other than your police salary, and yet the figures show that you spent more than your police salary. Can you offer any explanation for that?

Q. Mr. Screen: Have you ever received any financial assistance from your wife?

Q. Mr. Screen: And then you joined the Force. Now, since joining in 1921, have you inherited any money?

Q. Have you received any funds from anyone, legally or illegally?

Q. Foreman: Other than your police salary?

Q. Foreman: Captain, have you received any gifts or funds in excess—outside—in addition to your police income, police salary, which gifts or funds would have been in excess of one hundred dollars a year? That is something that you could not easily forget?

Q. Foreman: Captain, under oath, at the session of the Grand Jury on May 7th we asked you the question and got answers as follows:

Relative to your home in Bay St. Louis:

"Q. You say you paid five thousand dollars for that property in 1949, is that right?"

A. Yes.

Q. How much of that money was cash?
A. $3,000.00."

Captain, where did you get that $3,000.00?

Q. Mr. Screen: Is the $5,000.00 that you previously testified to as the total amount that has been spent on your home in Waveland, is that the total amount?

Q. Foreman: According to your pay records which we have obtained from the City of New Orleans the Police Department, your income from salary for the year 1949 amounted to $2370.12 after withholding and income tax and pension and according to the records which we have obtained from the police Credit Union, the National Bank of Commerce, the Hartsfield Loan Company, the Merchant's Bank of Bay St. Louis and the rent figure supplied by you, your cash out-lay for 1949, exclusive of living expenses and deposits made to the Whitney National Bank totalled $3188.96. This represents a figure of $1218.84 excess cash outlay over income for the period 1949 exclusive of living expenses, insurance premiums, expenses of running the home across the lake and expenses of operating the vehicles which you have. Can you explain that?

Q. Foreman: Captain, according to your pay records which we have obtained from the City of New Orleans and the Police Department your income for 1950, after deductions for withholding income tax and pension totalled $2595.65. According to the records which we have obtained from the Police Credit Union, the National Bank of Commerce in New Orleans, the Hartsfield Loan Company, the Merchant's Bank in Bay St. Louis, the rent figures supplied by you, your cash outlay for 1950 exclusive of living expenses and deposits made in the Whitney National Bank totalled $4073.06. This represents a figure of $1477.41 excess cash outlay of income for the period 1950 exclusive of living expenses, insurance premiums, expenses of running your home across the lake and expenses of operating the vehicles which you have. Will you explain that?

Q. Foreman: Captain, according to your pay records

which we have obtained from the City of New Orleans and the Police Department your income for 1951 was $2831.95 after deductions for Federal Income Tax and pension. According to the records we have obtained from the Police Credit Union, the National Bank of Commerce in New Orleans, the Hartsfield Loan Company, the Merchant's Bank in Bay St. Louis and the rent figure supplied by you, your cash out-lay totalled $3736.57. This represents a figure of $994.62 excess cash out-lay over income for the period 1951 exclusive of living expenses, insurance premiums expenses of running your home across the lake and expenses of operating the vehicles which you have. Can you explain that?

Q. Foreman: For the first four months of 1952, Captain, in other words, January, February, March and April of this year, according to your pay records which we have obtained from the City of New Orleans and the Police Department, your income for those four months totalled $906.24 after with-holding for Federal Income Tax and pension. According to the records which we have obtained from the Police Credit Union, the National Bank of Commerce in New Orleans, the Hartsfield Loan Company, the Merchant's Bank in Bay St. Louis and the rent figure which you have supplied, your cash out-lay for these four months, exclusive of living expenses and deposits made in the Whitney National Bank totalled a figure of $1493.10. This represents a figure of $586.95 excess cash outlay over income for the four months, January through April, 1952. This is exclusive of living expenses, insurance premiums, expenses of running the home across the lake and the expenses of operating the vehicles which you own. Can you explain that Captain?

Petitioner avers that his answer to each of the above questions was as follows:

A. I refuse to answer the question on the grounds that it might incriminate me or lead to questions or facts that might tend to incriminate me.

2

That on July 3, 1952, a motion was filed by the Foreman of the Grand Jury, Robert M. Walmsley, III, on behalf of the Grand Jury, setting forth the above listed questions and requesting that petitioner be made to show cause why he should not be held in contempt; that his Honor, Judge J. Bernard Cocke, Judge of Section E, did sign an order on July 3, 1952, wherein your petitioner, Joseph F. Vitari, Sr. was ordered to show cause on July 8th, 1952, why he should not be held in contempt for refusal to answer the questions above stated; that petitioner appeared in the Criminal District Court, Section E, and that the above questions were repeated to him and the Judge of the said Section E did order petitioner to answer all of the questions, whereupon your petitioner refused to answer same on the ground that the answers may tend to incriminate him, all in accordance with the rights guaranteed to your petitioner by virtue of the provisions of Article I, Section 11, of the Constitution of 1921, of the State of Louisiana, and the Fourteenth Amendment of the United States Constitution; that His Honor, the Trial Judge, found your petitioner guilty of contempt under the authority of Title 15, Sections 11 and 12 of the Revised Statutes of 1950, State of Louisiana, on July 14, 1952, and sentenced petitioner in accordance therewith; that thereafter your petitioner, through his Counsel, informed the Court of his intention to file an application for writs to the Supreme Court of the State of Louisiana, whereupon the Honorable Trial Judge deferred execution of sentence of ten days and $100.00 fine, and in default of payment of the $100.00, an additional ten days, until such time as this Court should rule upon his application.

3

Petitioner further avers that he filed in the Supreme Court of the State of Louisiana an application for writs

of certiorari, mandamus, prohibition and habeas corpus, which writs were denied on July 23, 1952; that the Supreme Court stated that the writs were denied on the authority of the case of *State* v. *Rodriguez,* 52 S. 2d, 756, 219 La. 217. Petitioner further avers that the ruling of the Supreme Court of the State of Louisiana in effect passed upon the constitutionality of Section 13, Article 19, of the Constitution of the State of Louisiana for the reason that the constitutionality was passed upon and held valid in the case of *State* v. *Rodriguez, supra.* The effect of the manner in which the Supreme Court of Louisiana denied the writs in the instant case was the same as if the instant case and the cited case of *State* v. *Rodriguez* were companion cases.

4

Petitioner further avers that Section 13 of Article 19 reads as follows:

> "Section 13. Any person may be compelled to testify in any lawful proceeding against any one who may be charged with having committed the offense of bribery and shall not be permitted to withhold his testimony upon the ground that it may incriminate him or subject him to public infamy; but such testimony shall not afterwards be used against him in any judicial proceedings, except for perjury in giving such testimony."

5

Petitioner further avers that in the case of *State* v. *Rodriguez* the constitutionality of the above quoted section of the Louisiana Constitution was decided by the Supreme Court of the State of Louisiana. It was held that the Section was constitutional, the Supreme Court stating as follows:

> "In the leading case of Twining v. State of New Jersey, 1908, 211 U. S. 78, 29 S. C. 14, 26, 53 L. Ed. 97, it was held that the exemption from self-incrimination provided by the Fifth Amendment was not one of the

fundamental rights of national citizenship so as to be included among the privileges and immunities of citizens of the United States which the states are forbidden to abridge by the provision of the Fourteenth Amendment that no state shall deprive any person of life, liberty, or property without due process of law. In the cited case the Supreme Court said: '* * * we think that the exemption from compulsory self-incrimination in the courts of the states is not secured by any part of the Federal Constitution.'

"The above is full and complete authority for the proposition that the State of Louisiana, or any other state, is not compelled to guarantee to its citizens immunity from self-incrimination."

6

Petitioner further avers that the State of Louisiana has granted to its citizens immunity from self-incrimination by incorporating into its Constitution Article 1, Section 11.

Petitioner further avers that this is a guarantee of self-incrimination against all crimes; that Article 19, Section 13, is an exception insofar as the crime of public bribery is concerned. Petitioner further avers, with due respect, that the findings of the Honorable Trial Judge that the holding in the *Rodriguez* case that both sections of the constitution are of equal force, are clear and unambiguous, is erroneous on its face.

7

Petitioner further avers that the Grand Jury of the Parish of Orleans was impaneled and was instructed by the then presiding Judge, Judge Niels F. Hertz, that they should investigate all crimes; that the Grand Jury before which your petitioner has been found in contempt was *not* impaneled for the specific purpose of investigating into the crime of public bribery and corrupt influence, as was true of the Grand Jury in the above mentioned case of *State* v. *Rodriguez;* that your petitioner, knowing that the present

grand jury before which he has been held to have been in contempt, was investigating all of the crimes prescribed by the various statutes of the State of Louisiana, was apprehensive of the possible criminal prosecution for any act that may have been violative of the aforesaid criminal statutes; therefore, your petitioner, under the provisions of the Constitution of the State of Louisiana, and that of the United States of America, could properly refuse to answer questions and that said refusal could in no way be likened to that passed upon in the above mentioned case of *State* v. *Rodriguez.*

8

Your petitioner further avers that the questions propounded to him, as set forth above, were of a general nature and could possibly elicit answers which could lead to a prosecution or form a link in a chain of evidence which could lead to prosecution under any and all laws of the State of Louisiana and under any and all laws of the other 47 states of the United States, and under any or all laws of the Federal Government; that said questions were so general and comprehensive in nature that it is impossible to conclude what the Grand Jury before which your Relator has been held to have been guilty of contempt, was pursuing; that in view of said fact, coupled with the fact that the questions in the recent case of *State* v. *Rodriguez,* were specific and exempletive of the investigation being pursued, your petitioner is entirely within his rights, as set out in Section 11 of Article 1 of the Louisiana Constitution and the 14th Amendment of the Constitution of the United States.

In the case of *Marcello* v. *United States,* 196 F. 2d 437, the United States Court of Appeals for the Fifth Circuit stated:

> "An early opinion of the United States Supreme Court authored by Chief Justice Marshall held that a federal court may not compel a witness to testify against himself in any criminal case, even though the

offense be one against the state rather than against the federal government. United States v. Saline Bank, 1 Pet. 100, 7 L. Ed. 69; see also opinion of Mr. Justice Holmes in Ballmann v. Fagin, 200 U. S. 186, 195, 26 S. Ct. 212, 50 L. Ed. 433. There can be no doubt however that the learned district judge had in mind the later rulings of the Supreme Court, which are binding alike upon him and upon this court, such as United States v. Murdock, 284 U. S. 141, 52 S. Ct. 63, 76 L. Ed. 210, and Feldman v. United States, 322 U. S. 487, 64 S. Ct. 1082, 88 L. Ed. 1408; see also 58 Am. Jur. Witnesses, sec. 51; Annotation 82 ALR 1376, 8 Wigmore on Evidence (2nd Ed.) Sec. 2258. The doctrine is so strongly entrenched that it appears as futile to protest as it is to expect an individual to feel that his constitutional privilege has been safe-guarded because the penitentiary into which his answer may land him is under the supervision of the state instead of the federal government."

• • • • • • •

"A method by which the privilege may be completely circumvented suggests itself when we consider that State tribunals may pursue a like course with reference to criminal offenses against the federal government. See Feldman v. United States, 322 U. S. 487, 64 S. Ct. 1082, 88 L. Ed. 1408. With much inconsistency, we may indulge the hope that more state courts will follow the lead of the Supreme Court of Michigan in the view that,

"It seems like a travesty on verity to say that one is not subjected to self-incrimination when compelled to give testimony in a State judicial proceeding which testimony may forthwith be used against him in a Federal criminal prosecution.' People v. DenUyl, 318 Mich. 645, 29 NW 2d 284, 287, 2 ALR 2d 625, 628."

9

Petitioner further avers that it is without legal foundation for any prosecutor, investigating body or any Court to

try your petitioner and find him guilty of contempt in the refusal to answer questions, when said questions are taken out of context, and are isolated from other questions answered in other matters covered. Your petitioner further avers that there are innumerable decisions holding that there can be no contempt proceeding of the nature herein decided, based upon isolated questions of a series.

The leading case on this question, *Foot* v. *Buchanan*, 113 Fed. 156, 161, decided by the former Circuit Court for Mississippi, states:

> "It is argued by the District Attorney that some of the questions asked (we have not stated them all) could have been answered without endangering the petitioner. We cannot accept that view. It was one examination, relating to one subject, and the questions culminated in an effort to show the witness' connection with the misdemeanor charged. Where there is a series of questions, the examiner cannot 'pick out one, and say, if that be put, the answer will not incriminate him.'"

In *United States* v. *Harry Russell (Crime Committee Case)*, decided in the United States District Court for the District of Columbia on February 5, 1951, the rule is thus stated:

> "Some of the questions propounded to the defendant were not, standing alone, pertinent to the subject of the committee investigation. Their relevancy becomes apparent only when they are considered as links in a chain of questions designed to elicit answers which taken together would warrant deduction of ultimate facts sought to be established."
>
> "The defendant had a right to so regard the questions, and if he was apprehensive that the facts so deduced might incriminate him, he was, in the opinion of the Court, privileged to remain mute."

In commenting on this rule of law, Judge Morris, in a case in the United States District Court for the District of Columbia, "The Amerasia case", *United States* v. *Jaffee*, 98 F. Sup. 191, 196 (1951), said:

> "It is further to be noted that many of the questions asked this defendant and which he declined to answer on the ground that such answers would tend to incriminate him were so obviously incriminating on their face that they were not made the subject of contempt proceedings, as were the questions set forth in the twenty-six counts of the indictment."

Petitioner further avers that prior to the hearing of the rule for contempt of the Grand Jury, your petitioner filed in the Crinimal District Court for the Parish of Orleans a prayer for oyer, wherein your petitioner sought the entire transcript of all the proceedings wherein he appeared under subpoena as a witness before the Grand Jury of the Parish of Orleans. That your petitioner averred in the Criminal District Court for the Parish of Orleans in the said prayer for oyer that he had answered certain questions concerning the crime of public bribery and that it was necessary that the advice, admonitions and instructions concerning the obligation to answer questions and the immunities afforded the witness under the law of Louisiana as directed to your petitioner by the Grand Jury and the District Attorney for the Parish of Orleans, assisting the Grand Jury, be made a part of the record in order that your petitioner would be in a position to properly defend himself. That the Honorable Judge of the Criminal District Court for the Parish of Orleans refused the request for oyer on the part of your petitioner on the grounds that the requested material had no bearing on the rule before the Court.

11

Petitioner further avers that prejudicial error was committed in refusing to allow the prayer for oyer wherein the entire transcript of his testimony was requested for appearances on three occasions before the Grand Jury for the Parish of Orleans for the reason that said transcript would show that your petitioner answered specific questions relating to the crime of public bribery; that the questions upon which petitioner has been found guilty of contempt are general in nature and are not conducive to an answer limited in scope; that your petitioner avers than the jurisprudence is well settled that the witness is the final judge of whether a question will elicit an answer that will incriminate him or form a link in a chain of evidence that may form the basis for prosecution of a criminal statute.

12

Estes v. *Potter*, 163 F. 2d 865 (1950), cert denied, 340 U. S. 920. The Court said:

> "The questions propounded to appellant do not disclose the incriminatory nature of the answers, sought to be elicited, but appellant does not have to prove that his answers would incriminate him to be entitled to his privilege. If that were the nature of the burden, he would be forced to divulge the very facts that the immunity permits him to suppress." U. S. v. Burr, 25 Fed. Page 38, at page 40, No. 14,692; State v. Butler, 47 S. C. 23, 24 S. E. 991.

That in view of the above stated facts and law, your petitioner was entirely within his rights, secured to him by Sec. 11, Art. 1 of the Constitution of 1921, State of Louisiana, and the 14th Amendment of the Federal Constitution in refusing to answer the above listed listed questions.

Your petitioner further avers that it has been held in every state wherein the right against self-incrimination has been limited with the restriction of the fundamental right as stated above, must be accompanied by complete immunity in order that the basic rights secured under "due process of law" be not violated; that it has been held and a reading of Section 13, Article 19, confirms the holding, that the immunity from prosecution as provided for in the above stated amendment to the Constitution of the State of Louisiana provides immunity with respect to the crime of public bribery only; your petitioner further avers that the jurisprudence is well settled to the effect that a judge, a District Attorney and an investigating body are all powerless to extend immunity beyond that set out by law.

Apodaca v. Viramontes, 53 N. M. 514, 212 P. 2d 425, 13 ALR 2d, 1427.

"The defendant refused to answer questions depending upon his constitutional rights against self-incrimination, whereupon the District Attorney offered complete immunity and the action was approved by the Court. The witness continued to refuse to answer and was held in contempt by the Court."

Issue: The decisive question then, is whether the District Attorney and the District Court in New Mexico, absent constitutional provision or enabling statute conferring the power, are authorized to grant immunity from prosecution for an offense to which incriminating answers provoked by questions asked will expose the witness:

• • • Citing 3 Jones on Evidence (Civil Cases, 4th Ed.) 1652, § 888, the Court states:

• • • • • • •

"The mere fact that the prosecuting officer had promised him immunity or states in open court that he

> will not prosecute the witness or file any information against him does not change the rule; the immunity must be something more substantial than the grace, or favor of the prosecuting officer."

In view of the fact that the immunity is limited, and in view of the fact that your petitioner is the final judge of incriminating questions, and in view of the further fact that the questions upon which this contempt is founded are the epitome of generality, your petitioner was entirely within his rights, as was stated by the Court in *State* v. *Rodriguez*, in refusing to answer.

14

Petitioner further avers that Section 13 of Article 19 is violative of the Fourteenth and Fifth Amendments of the Federal Constitution for the reason that it deprives your petitioner of due process of law, and of his inalienable privileges and immunities in that said section and article of the Constitution of the State of Louisiana does not afford your petitioner the right against self-incrimination as is set forth in the Fourteenth and Fifth Amendments of the Federal Constitution.

Petitioner further avers that if the answers to the question as above set forth were to give evidence that the petitioner was engaged in an illegal business, wholly unconnected with the crime of public bribery, and violative of the criminal laws of the State of Louisiana, your petitioner could be prosecuted; that if your petitioner, in answer to the above questions, were to give evidence which would show a violation of any Federal laws, or laws of the other States of the United States, your petitioner would be subject to prosecution for the violation of such laws. Petitioner avers that by virtue of the provisions of Section 13 of Article 19 of the Constitution of Louisiana, your petitioner is granted no immunity from fines and forfeitures that may result in

convictions which would grow out of evidence coerced from your petitioner by virtue of the provisions of the said section of the Constitution of Louisiana. Your petitioner further avers that the Supreme Court of the United States has, in innumerable instances, declared that confessions adduced through threats and intimidation and used in prosecutions in the various State Courts of the United States was a denial of due process of law as guaranteed by the Fourteenth and Fifth Amendments of the Federal Constitution; that the above quoted provision of the Constition of the State of Louisiana is in effect an attempt to secure such evidence and admissions in much the same manner as those which this Court has declared unconstitutional and that therefore the said Section 13 of Article 19 is unconstitutional in that it denies the petitioner the privileges and immunities and the due process of law as set forth in the Fifth and Fourteenth Amendments of the Constitution of the United States.

15

Petitioner further avers that Section 13 of Article 19 of the Louisiana Constitution as written and construed is violative of the 14th Amendment of the Federal Constitution for the reason that, as written and construed, it deprives your petitioner of due process of law and of his privileges and immunities as are guaranteed him by the 14th Amendment of the Federal Constitution.

16

Petitioner further avers that in innumerable decisions this Court, when passing upon statutes which demand the testimony of witnesses in return for complete immunity from fines and forfeitures which may be brought about as a result of the information divulged—that the immunity granted or the immunity from prosecution must be co-ex-

tensive with the right against self-incrimination as secured in the Bill of Rights.

Counselman v. *Hitchcock* (1892), 142 U. S. 547, 35 L. Ed. 1110, 12 S. Ct. 195.

Petitioner further avers that there is no immunity granted under the provisions of the above quoted section and article of the Constitution of Louisiana. Petitioner avers that as written and construed, he could be forced to give information which in effect would constitute confession.

17

Petitioner further avers that in the Twining decision referred to by this Honorable Court (Louisiana Supreme Court) in the case of *State* v. *Rodriguez* (*Twining* v. *N. Y.*, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97) the question before the Supreme Court of the United States was the right of the prosecuting officer to comment on a defendant's remaining silent, or refusing to take the witness stand in a criminal proceeding; whereas Section 13 of Article 19 compels a witness to give testimony against himself regardless of what that testimony is, and what crime he confesses having committed, if the District Attorney or investigatory body informs him that they are investigating bribery. In a more recent case before the Supreme Court of the United States, *Adamson* v. *People of the State of Calif.*, 332 U. S. p. 46, 67 Sup. Ct. p. 1672, the same question was before the Court and it was held that a law providing for the comment on a defendant's not taking the witness stand was not violative of the "sense of fairness" in a criminal proceeding as is contemplated by the Fifth Amendment as applicable against a State by virtue of the 14th Amendment; that the Supreme Court of the United States, in a 5 to 4 decision upheld the ruling of the *Twining* case and noted that there *could* be

instances wherein state provisions could be violative of this "sense of fairness" in criminal proceedings; petitioner further avers that any law requiring a witness to give evidence against himself without affording complete immunity is just as violative of the Constitutional concept of "sense of fairness" as is the confession extracted through physical violence; that Section 13 of Article 19 does violate the "sense of fairness" and is in conflict with and in violation of the due process clause and the privilege in immunities provisions of the 14th Amendment of the Constitution of the United States and therefore illegal and void.

18

Petitioner further avers that on July 28, 1952, he was committed to the Parish Prison for the Parish of Orleans and there began serving the sentence above referred to. That under the provisions of the sentence your petitioner must serve through the 6th day of August, 1952 and in default of payment of the $100.00 fine, petitioner must serve through August 16, 1952. That on August 13, 1952, the Honorable Justice Hugo Black issued a stay of execution whereunder petitioner was released from custody pending the action of this Court on this application.

19

Petitioner further avers that this Honorable Court has jurisdiction to review the instant case by virtue of writs of certiorari and review.

The issue of unconstitutionality of the above stated section and article of the Constitution of 1921 of the State of Louisiana was raised by motion to quash in an answer to a rule taken against your petitioner in the Criminal District Court for the Parish of Orleans, State of Louisiana, to show cause why he should not be held in contempt for his refusal

to answer certain of the questions that had been propounded to him on the grounds as above stated.

The trial Court sustained the validity of Section 13 of Article 19 of the Constitution of the State of Louisiana. The Supreme Court of the State of Louisiana refused writs of certiorari, mandamus, prohibition and/or habeas corpus on authority of prior jurisprudence of the Court in the case of *State* v. *Rodriguez.*

The Supreme Court of the United States has jurisdiction to review the case on appeal by virtue of the provisions of Title 28, U.S.C. Sec. 1257, 62 Stat. 929.

20

Petitioner further avers that the date upon which the decree of the Supreme Court sought to be reviewed was rendered on July 23, 1952. This petition is filed and presented to this Honorable Court within the 90 day period set out in Rule 38½ of the Rules of this Honorable Court.

21

Petitioner further avers that in recent years the variout States have passed statutes which in effect erase the fundamental right against self-incrimination and there has been profuse activity in the field of investigation by local State and Federal authorities. The questions presented are appropriate and substantial in the light of these happenings. A line of decisions of the Supreme Court of the United States high-lighted by *Twinning* v. *New Jersey,* and more recently *Adamson* v. *State of California,* (the latter case a 5 to 4 decision) have brought into focus the principle of the right against self-incrimination as set forth in the Fifth Amendment of the Constitution of the United States. In none of the instances has the question ever been raised before the Supreme Court of the United States

of whether or not a State may deny a witness or a defendant the right to decline giving information against himself by way of testimony under oath. In the *Twinning* and *Adamson* cases, supra, the validity of procedural statutes allowing a prosecuting officer to comment on a defendant not taking the witness stand in his own defense were held valid, as not being violative of the 14th Amendment of the Constitution of the United States, and that these procedural statutes may have denied the parties the fundamental right as evidenced by the Fifth Amendment of the Constitution of the United States.

22

Petitioner further avers that the validity of Section 13, Article 19, of the Constitution of 1921, State of Louisiana, as above quoted, was attacked as unconstitutional and in derogation of the rights secured applicant by the Constitution of the United States, by way of motion to quash in the Criminal District Court of the Parish of Orleans, State of Louisiana.

His Honor, the Judge of the Criminal District Court for the Parish of Orleans, upheld the validity on the grounds that the right against self-incrimination need not be guaranteed by a State and that the right granted in the Constitution of the United States was only operative where the Federal Government was concerned.

The validity of the above named section of the Constitution of Louisiana was attacked in applicant's petition for writs of certiorari, mandamus, prohibition and/or habeas corpus to the Supreme Court of the State of Louisiana. The Supreme Court of the State of Louisiana denied the writs on the authority of the prior jurisprudence, *State* v. *Rodriguez.* In the said case of *State* v. *Rodriguez,* the above quoted section of the Constitution of Louisiana was

held as not being in violation of the Constitution of the United States, citing *Twinning* v. *New Jersey, supra.*

It is submitted that this application for writs should be allowed; that the said question involved is substantial and that Section 13 of Article 19 of the Constitution of 1921, State of Louisiana, is unconstitutional and the decisions of the State Courts are erroneous and should be reversed.

Wherefore, petitioner prays that writs of certiorari and review issue herein according to law, directed to the Supreme Court of the State of Louisiana, ordering the said Court to send to this Court a certified copy of all of the proceedings had in the case hereinabove mentioned and that, upon due hearing that all acts, orders and proceedings had in the said Court, be set aside, annulled and dissolved, as being in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

Respectfully submitted,

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EDWARD A. WALLACE,
Attorneys for Joseph F. Vitari, Sr.

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Supreme Court of the United States

No. 399

IN RE: JOSEPH F. VITARI

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

BENTLEY G. BYRNES,
EDWARD A. WALLACE,
Counsel for Petitioner.

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Supreme Court of the United States

No. 399

IN RE: JOSEPH F. VITARI

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

JURISDICTION

The jurisdiction of this Court is based upon Title 28, United States Code, Section 1257, in that the constitutionality of a State law was raised and the ruling of the State Court was in favor of its validity.

ASSIGNMENT OF ERRORS

The conviction and sentence of petitioner, which is based upon Article 19, Section 13, of the Constitution of Louisiana is invalid for the reason that it denied petitioner due process of law in that it is an attempt to secure a confession by intimidation.

The conviction and sentence of petitioner, based upon Article 19, Section 13, is invalid for the reason that it is based upon a law which denies your petitioner the privileges and immunities guaranteed by the Fourteenth Amendment of the Federal Constitution in that it denies him the right against self-incrimination without affording him adequate protection against prosecu-

tion which may grow out of testimony given under compulsion.

May It Please this Honorable Court:

STATEMENT OF THE CASE

The facts necessary for the consideration of the Federal question presented to this Honorable Court in the petition for writs of certiorari and review are as follows:

Petitioner was subpoenaed to appear before the Grand Jury of the Parish of Orleans, State of Louisiana, as a witness in connection with the normal duties of the Grand Jury of inquiring and investigating violations of the Criminal Statutes of the State of Louisiana. In answer to the subpoena, petitioner appeared and certain questions were propounded to him, some of which he refused to answer on the ground that the answers might incriminate him or that they might lead to other questions or facts that might incriminate him. Petitioner was ruled into Court to show cause why he should not be held in contempt for his refusal to answer the questions and upon his persistence in his refusal, he was cited for contempt and has served seventeen days of a twenty day sentence imposed upon him.

ARGUMENT

The basis for the sentence and the citation of contempt is Section 13 of Article 19 of the Constitution of Louisiana of 1921, which reads as follows:

> "Section 13. Any person may be compelled to testify in any lawful proceeding against any one who may be charged with having committed the offense of bribery and shall not be permitted to withhold his testimony upon the ground that

> it may incriminate him or subject him to public infamy; but such testimony shall not afterwards be used against him in any judicial proceedings, except for perjury in giving such testimony."

It is the position of the petitioner that the above quoted section of the Constitution of the State of Louisiana is in violation of and in conflict with the Fourteenth Amendment of the Constitution of the United States and therefore null and void. As has been stated in the petition for writs of certiorari filed in this Court, the Supreme Court of the State of Louisiana has held that on authority of the case of *Twining v. New Jersey*, 211 U.S. 78, 29 S. Ct., 14, 53 L. Ed. 97, the above quoted Section of the Constitution of Louisiana is valid.

It is respectfully submitted that Section 13 of Article 19 is unconstitutional in that it denies petitioner due process of law as guaranteed him by the Fourteenth Amendment of the Constitution of the United States. The quoted provision of the Constitution of the State of Louisiana and the interpretation given it by the Supreme Court of the State of Louisiana is in violation of the Fourteenth Amendment of the Constitution of the United States in two respects.

> FIRST: Its verbiage and use has been applied in an attempt to extort a confession upon which criminal prosecution might lie.
>
> SECOND: While the law compels the giving of incriminating evidence, it grants no immunity from fines or forfeitures which may result from the disclosures.

CONFESSIONS

In instances too numerous to mention, this Court has held that a conviction based upon a confession

through coercion is invalid in that there is a denial of due process of law.

In the case of *Brown v. State of Mississippi*, 297 U.S. 278, 56 Supreme Court, 461 (1936) the Court states:

> "The due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' *Hebert v. Louisiana*, 272 U.S. 312, 316, 47 S. Ct. 103, 104 71 L. Ed. 270, 48 A.L.R. 1102. It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process."

Earlier, in the case of *Ziang Sun Wan v. United States*, 266 U.S. 1, 45 Supreme Court, 1, in defining the requirements with respect to the voluntary nature of a confession, the Court stated:

> "* * * A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise. *Bram v. United States*, 168 U.S. 532, 18 S. Ct. 183, 42 L. Ed. 568."

In both instances defendants had been coerced into giving confessions or signing statements through the use of physical coercion.

By virtue of the aforementioned section of the Constitution of the State of Louisiana and the inherent powers of the Courts of this State in the execution of these laws, the witness is compelled to give disclosures on the threat of jail sentence. It is respectfully submitted that there is little or no difference in the coercion. The difference lies only in the degree.

It may be argued that the *Brown* and *Ziang Sung Wan* cases have no application in that the question for decision was whether a conviction based on a coerced confession would lie, whereas in the present instance no confession has yet been made. However, the only difference in the two instances is the stage at which the coercion is applied. If the application of intimidation and threats and physical violence denies due process, as is stated in the *Brown* and *Ziang Sung Wan* cases, the denial is inherent in the method just as well as in the use to which the results are put.

ADEQUACY OF IMMUNITY

As is evident from a reading of Section 13, Article 19, of the Constitution of Louisiana, as quoted above, the witness may be compelled to answer even though his answer may subject him to fines, forfeitures and penalties of any criminal statute provided for by the laws of the State of Louisiana or any other governmental body.

The question of withdrawing the privilege against self-incrimination and the right secured the individual has been passed upon in innumerable instances. The leading case, and one frequently referred to by this Court is that of *Counselman v. Hitchcock*, 142 U.S. 547, 35 L. Ed. 1110, 12 S. Ct. 195. In that case the Court stated:

> "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates. In this respect, we give our assent rather to the doctrine of *Emery's* case, in Massachusetts, than to that of *People v. Kelly*, in New York; and we consider that the ruling of this court in *Boyd v. United States, supra*, supports the view we take. Section 860, moreover, affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party."

The same principle has been applied by the State Courts in nearly every State in the Union. See *Henry Emery's* case, Mass. Reports, 107, 108, page 172, 9 Am. Rep. 22. *Doyle v. Hofstader*, 177 N.E. 497, *In re: Nicastro*, 111 NYS 2d, 222.

In the *Emery* case, *supra*, the Supreme Court of Massachusetts stated:

> "It follows from the considerations already named, that, so far as this statute requires a witness, who may be called, to answer questions and produce papers which may tend to criminate himself, and attempts to take from him the constitutional privilege in respect thereto, it must be entirely ineffectual for that purpose, unless it also

relieves him from all liabilities, for protection against which the privilege is secured to him by the Constitution. The statute does undertake to secure him against certain of those liabilities, to-wit: the use of any disclosures he may make, as admissions or direct evidence against him, in any civil or criminal proceeding.

"In a case already referred to, *People v. Kelly*, 24 NY 74, it was held that such a provision by statute, removed all the liability against which the witness was secured by the constitutional exemption, and that, being thus otherwise furnished with all the protection to which the Constitution entitled him, he had no further occasion, and therefore no right, to set up the claim of privilege, as a protection against that to which he was not exposed. But this decision was made upon the ground that the terms of the provision relied on in the Constitution of New York protected the witness only from being compelled 'to be a witness against himself' and did not protect him from the indirect and incidental consequences of a disclosure which he might be called upon to make.

"The terms of the provision in the Constitution of Massachusetts require a much broader interpretation, as has already been indicated, and no one can be required to forego an appeal to its protection, unless first secured from future liability and exposure to be prejudiced, in any criminal proceeding against him, as fully and extensively as he would be secured by availing himself of the privilege accorded by the Constitution. Under the interpretation already given, this cannot be accomplished so long as he remains liable to prosecution criminally for any matters or causes in respect of which he shall be examined or to which his testimony shall relate. It is not done, in direct terms, by the statute in question; it is not contended that the statute is capable of an interpretation which will give it that effect; and

it is clear that it cannot and was not intended so to operate. Failing then, to furnish to the persons to be examined an exemption equivalent to that contained in the Constitution, or to remove the whole liability against which its provisions were intended to protect them, it fails to deprive them of the right to appeal to the privilege therein secured to them.

"The result is, that, in appealing to his privilege, as an exemption from the obligation to answer the inquries put to him, the petitioner was in the exercise of his constitutional right; and his refusal to answer upon that ground was not and could not be considered as disorderly conduct, or a contempt of the authority of the body before which he was called to answer."

CONCLUSION

It is respectfully submitted that the conviction and sentence of the petitioner is null and void for the reason that it is based upon a law which denies your petitioner the due process guaranteed him by the Fourteenth Amendment of the Constitution of the United States and the privileges and immunities afforded him as a citizen of the United States and should therefore be set aside.

Respectfully submitted,

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